

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, September 22, 2021

Hearing Room 1568

10:00 AM

2:19-18382 Shoezoo.com, LLC

Chapter 7

Adv#: 2:20-01627 Menchaca, Chapter 7 Trustee v. Sida

#1.00 HearingRE: [37] Ex parte application Chapter 7 Trustee's Second Ex Parte Application for Order for Publication of Summons; Declaration of Steven F. Werth w/Proof of Service

Docket 37

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Second Application is **GRANTED**.

Pleadings Filed and Reviewed:

- 1) Chapter 7 Trustee's Second Ex Parte Application for Order for Publication of Summons [Doc. No. 37]
 - a) Notice of Chapter 7 Trustee's Second Ex Parte Application for Order for Publication of Summons [Doc. No. 38] Ex-Parte Application for Order for Publication of Summons or Service through Debtor's Counsel [Doc. No. 14] (the "Motion")
 - b) Notice of Ex-Parte Application for Order for Publication of Summons or Service through Debtor's Counsel [Doc. No. 15]
- 2) No opposition is on file as of the date of issuance of this tentative ruling

I. Facts and Summary of Pleadings

Shoezoo.com, LLC ("Debtor") filed a voluntary Chapter 7 petition (the "Petition") on September 24, 2020. The Debtor is owned by Alon Sida ("Sida"), who holds a 70% interest, and Richard Frank LaParl ("LaParl"), who holds a 30% interest. Sida and LaParl both executed the *Resolution and Action by Unanimous Written Consent of*

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Shoezoo.com, LLC which authorized the Debtor to seek bankruptcy protection. The Debtor is represented by Charles Shamash ("Shamash").

On September 24, 2020, the Chapter 7 Trustee (the "Trustee") filed a complaint against Sida, asserting claims under §§ 544, 547(b), 548, 550, and 551 (the "Complaint," and the action commenced by the filing of the Complaint, the "Avoidance Action"). The Avoidance Action seeks to recover \$3,108,409 in transfers to Sida.

The *Verification of Master Mailing List of Creditors*, signed under penalty of perjury by Sida, states that Sida's address is "1421 Ambassador Street, Unit 201, Los Angeles, CA 90035" (the "Los Angeles Address").

The Trustee has been unable to serve Sida. Shamash represents the Debtor but does not represent Sida in the Avoidance Action. Shamash previously advised the Trustee that Sida now resides in Israel and cannot leave the country as a result of the COVID-19 pandemic. Shamash has refused to provide the Trustee with Sida's current mailing address and has refused to accept service of the Complaint on Sida's behalf.

On March 16, 2021, the Court denied the Trustee's application for authorization to serve Sida by publication of the summons in the *Los Angeles Times* or, in the alternative, to serve Sida through Shamash, the Debtor's counsel (the "First Application"). The Court found that under California law—made applicable to this proceeding by Civil Rule 4(e)(1)—the Trustee was required to demonstrate an inability to locate Defendant despite the exercise of "reasonable diligence" in order to obtain an order authorizing service by publication. *See* Doc. No. 19. Specifically, the Court found:

There is no indication in the Motion that the Trustee has attempted to ascertain the Defendant's address by any means other than consulting with Shamash. On the record before it, the Court cannot find that the Trustee has exercised "reasonable diligence." The Court understands the Trustee's desire to effectuate service without incurring the additional costs of hiring a private investigator to ascertain the Defendant's whereabouts in Israel. However, this laudable objective does not permit the Court to disregard the statute.

Doc. No. 19 at 4.

Subsequent to the Court's denial of the First Application, the Trustee obtained an address for Sida in Israel through the use of a private investigator. The Trustee then attempted to serve Sida in Israel through the Hague Convention, but recently received

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a notice from Israel's Administration of Courts, Legal Assistance to Foreign Countries advising that Sida "has moved to an unknown address." The Trustee has been informed by Shamash that Sida has returned from Israel to the United States.

The Trustee now applies for authorization to serve Sida by publication (the "Second Application"). The Trustee asserts that he has exercised reasonable diligence in attempting to locate Sida. No opposition to the Second Application is on file.

II. Findings of Fact and Conclusions of Law

Civil Rule 4(e)(1) authorizes the Trustee to effectuate service by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the ... court is located or where service is made" Cal. Civ. Proc. Code § 415.50 authorizes service by publication, but only if "the party to be served cannot with reasonable diligence be served in another manner specified in this article"

"The term 'reasonable diligence' takes its meaning from the former law: it denotes a thorough, systematic investigation and inquiry conducted in good faith by the party or his agent or attorney. A number of honest attempts to learn defendant's whereabouts or his address by inquiry of relatives, friends, and acquaintances, or of his employer, and by investigation of appropriate city and telephone directories, the voters' register, and the real and personal property index in the assessor's office, near the defendant's last known location, are generally sufficient. These are likely sources of information, and consequently must be searched before resorting to service by publication.' However, the showing of diligence in a given case must rest on its own facts and '[n]o single formula nor mode of search can be said to constitute due diligence in every case.'" *Kott v. Superior Ct.*, 45 Cal. App. 4th 1126, 1137-38, 53 Cal. Rptr. 2d 215, 221 (Cal. 1996) (internal citations omitted).

The Court finds that the Trustee has exercised "reasonable diligence" with respect to his attempts to locate Sida. The Trustee identified an address for Sida in Israel through use of a private investigator. The Trustee then attempted to serve Sida through the Hague Convention. Unfortunately, as a result of the delays inherent in effectuating service under the Hague Convention, Sida was no longer in Israel when service was attempted upon the address the Trustee had obtained from his investigator. The Trustee then sent a process server to serve the Summons and Complaint upon Sida at the Los Angeles Address, but the process server reported that no one was at the residence.

Based upon the foregoing, the Second Application is **GRANTED**. The Trustee is authorized to serve the Summons and Complaint upon Sida by publication in the *Los*

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Angeles Times or in a comparable newspaper of nationwide distribution.

Within seven days of the hearing, the Trustee shall submit an order incorporating this tentative ruling by reference.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Shoezoo.com, LLC

Represented By
Charles Shamash

Defendant(s):

Alon Sida

Pro Se

Plaintiff(s):

John J Menchaca, Chapter 7 Trustee

Represented By
Steven Werth

Trustee(s):

John J Menchaca (TR)

Represented By
Steven Werth
Jeffrey L Sumpter

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2:21-12190 Sehee Bang

Chapter 7

Adv#: 2:21-01098 Na v. Bang et al

#2.00 Show Cause Hearing

RE: [1] Adversary case 2:21-ap-01098 Plaintiffs shall appear and show cause, if any there be, why the Complaint's claims under §§ 548, 550, and 551 should not be dismissed, based upon Plaintiff's lack of standing to pursue such claims.

Docket 1

***** VACATED *** REASON: PER ORDER ENTERED 9-21-21**

Tentative Ruling:

9/21/2021

Order entered. Hearing on Order to Show Cause **VACATED**.

Party Information

Debtor(s):

Sehee Bang

Represented By
Young K Chang

Defendant(s):

Sehee Bang

Represented By
Young K Chang

Ari Apparel, Inc

Pro Se

Charming You Boutique

Pro Se

DOES 1-10, Inclusive

Pro Se

Plaintiff(s):

Hyun Woo Na

Represented By
Joon M Khang

Trustee(s):

Edward M Wolkowitz (TR)

Pro Se

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2:21-12190 Sehee Bang

Chapter 7

Adv#: 2:21-01098 Na v. Bang et al

#3.00 Status Hearing

RE: [1] Adversary case 2:21-ap-01098. Complaint by Hyun Woo Na, Sehee Bang against Sehee Bang, Ari Apparel, Inc, Charming You Boutique. false pretenses, false representation, actual fraud)), (67 (Dischargeability - 523(a)(4), fraud as fiduciary, embezzlement, larceny)), (13 (Recovery of money/property - 548 fraudulent transfer)) (Khang, Joon)

FR. 8--17-21

Docket 1

***** VACATED *** REASON: PER ORDER ENTERED 9-21-21**

Tentative Ruling:

9/21/2021

Order entered. Status Conference **VACATED**.

Party Information

Debtor(s):

Sehee Bang

Represented By
Young K Chang

Defendant(s):

Sehee Bang

Pro Se

Ari Apparel, Inc

Pro Se

Charming You Boutique

Pro Se

DOES 1-10, Inclusive

Pro Se

Plaintiff(s):

Hyun Woo Na

Represented By
Joon M Khang

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CONT... Sehee Bang

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Trustee(s):

Edward M Wolkowitz (TR)

Pro Se

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2:20-14808 SCHREINER'S FINE SAUSAGES, INC.

Chapter 11

#4.00 HearingRE: [143] Motion RE: NOTICE OF MOTION AND MOTION FOR APPROVAL OF FIRST AND FINAL PROFESSIONAL FEES AND EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF DAVID GARELICK AND WALTER THOMAS SCHREINER IN SUPPORT THEREOF

Docket 143

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$4,200 approved (\$5,200 requested, reduced by \$1,000 to correct accounting *see* Exhibit C (David Garelick 12 hours drafting at \$200 per hour)) [Doc. No. 143]

Expenses: \$0.00 approved [*Id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

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CONT... SCHREINER'S FINE SAUSAGES, INC.

Chapter 11

Applicant shall submit a conforming order within seven days of the hearing.

Party Information

Debtor(s):

SCHREINER'S FINE SAUSAGES,

Represented By
Robert B Rosenstein

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2:20-14808 SCHREINER'S FINE SAUSAGES, INC.

Chapter 11

#5.00 HearingRE: [144] Motion RE: NOTICE OF MOTION AND MOTION FOR APPROVAL OF PROFESSIONAL FINAL FEES AND EXPENSES OF BANKRUPTCY COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATIONS OF ROBERT B. ROSENSTEIN AND WALTER T. SCHREINER IN SUPPORT THEREOF

Docket 144

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$32,312.80 approved [Doc. No. 144]

Expenses: \$4,600.15 approved [*Id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

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CONT... SCHREINER'S FINE SAUSAGES, INC.

Chapter 11

Applicant shall submit a conforming order within seven days of the hearing.

Party Information

Debtor(s):

SCHREINER'S FINE SAUSAGES,

Represented By
Robert B Rosenstein

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2:20-14808 SCHREINER'S FINE SAUSAGES, INC.

Chapter 11

#6.00 HearingRE: [145] Motion For Final Decree and Order Closing Case. RE: NOTICE OF MOTION AND MOTION FOR ENTRY OF FINAL DECREE AND CLOSING OF CASE; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF WALTER THOMAS SCHREINER IN SUPPORT THEREOF

Docket 145

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Motion is GRANTED.

Pleadings Filed and Reviewed

- 1) Notice of Motion and Motion for Entry of Final Decree and Closing of Case (the "Motion") [Doc. No. 145]
- 2) Motion in Support of Confirmation of Chapter 11 First Amended Plan of Reorganization [Doc. No. 128]
- 3) As of the date of issuance of this tentative ruling, no opposition is on file

I. Facts and Summary of Pleadings

Schreiner's Fine Sausages, Inc. the Chapter 11 Reorganized Debtor, is a California corporation (the "Debtor"). The Debtor operates a family-owned wholesale and retail fine meat market, known as Schreiner's Fine Sausages, located at 3417 Ocean View Blvd., Glendale, California 91208 (the "Family Business"). The Family Business has been located in Glendale since 1952, with the Family Business now being managed by the third generation of Schreiniers. Walter Thomas Schreiner holds 15% ownership in the Debtor, with the other 85% ownership held by his mother, Marcia Schreiner. The Debtor's bankruptcy was precipitated in part by certain high

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Chapter 11

interest merchant finance agreements entered into by the Debtor as part of its efforts to maintain and grow business operations, which the Debtor was ultimately unable to keep up with for reasons including the current COVID-19 pandemic.

Ultimately, the Debtor was not able to stay current on all of these obligations and had to file a Chapter 11 Voluntary Petition for Non-Individuals Filing for Bankruptcy on May 26, 2020, thus starting case 2:20-bl-14808-ER. It is a "small business debtor" as per 11 U.S.C. § 101(51D).

Operating over the past months as debtor-in-possession, the Debtor improved its business and financial structure. The Debtor was able to have its Chapter 11 Plan of Reorganization (the "Plan") confirmed by the Court and an Order was entered on June 23, 2021 (Doc. No. 132), and the Plan's Effective Date of July 23, 2021 has passed.

Since then, the Debtor has been operating in accord with the terms of the Plan and related state and federal law, and all pre-petition creditor claims are being serviced as specified under the Plan. No property transfers remain to be carried out under the Plan, the Debtor is running its own affairs and has control over its assets, and Plan distributions are being carried out on schedule.

II. Findings of Fact and Conclusions of Law

A. Final Decree

Under 11 U.S.C. § 350(a) and Fed. R. Bankr. P. 3022, the Court shall enter a final decree closing a chapter 11 case after the estate is fully administered. In determining whether an estate is fully administered, a court should consider:

- (1) whether the order confirming the plan has become final;
- (2) whether deposits required by the plan have been distributed;
- (3) whether the property proposed by the plan to be transferred has been transferred;
- (4) whether the debtor or the successor of the debtor under the plan has assumed the business of the management of the property dealt with by the plan;
- (5) whether payments under the plan have commenced; and
- (6) whether all motions, contested matters, and adversary proceedings have

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CONT... **SCHREINER'S FINE SAUSAGES, INC.**
been finally resolved.

Chapter 11

In re Ground Systems, Inc., 213 B.R. 1016, 1019 (9th Cir. BAP 1997), *quoting* Fed. R. Bankr. P. 3022 advisory committee's notes (1991).

The Court finds that entry of a final decree closing this case is warranted as follows: (i) the order confirming the Plan is now final; (ii) payments under the Plan have commenced; (iii) property proposed by the Plan has been transferred, and (iv) the Debtor has assumed business management. Motion at 5. In sum, the Court's involvement in the case is no longer required and the Court finds the case has been "fully administered."

The Court finds that entry of a final decree is appropriate. The Post-Confirmation Status Conference scheduled for October 19, 2021, at 10:00 a.m is hereby VACATED.

Based upon the foregoing, the Motion is GRANTED. The Debtor shall submit a proposed order, incorporating this tentative ruling by reference, within seven days of the hearing.

III. Conclusion

For the reasons set forth above, the Motion is GRANTED.

The Debtor is directed to lodge a conforming proposed order, incorporating the tentative ruling by reference, within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

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CONT... SCHREINER'S FINE SAUSAGES, INC.

Chapter 11

Debtor(s):

SCHREINER'S FINE SAUSAGES,

Represented By
Robert B Rosenstein

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11:00 AM

2:19-13763 Ya-Chuan Victor Lee

Chapter 11

#100.00 HearingRE: [176] Motion For Final Decree and Order Closing Case. (with proof of service)

Docket 176

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the Motion is GRANTED.

Pleadings Filed and Reviewed

- 1) Motion for Final Decree and Order Closing Case (the "Motion") [Doc. No. 176]
- 2) Motion for Order Confirming Chapter 11 Plan (the Plan") [Doc. No. 166]
- 3) Status Report for Chapter 11 Status Conference [Doc. No. 178]
- 4) As of the date of issuance of this tentative ruling, no opposition is on file

I. Facts and Summary of Pleadings

Debtor and Debtor-in-Possession Ya-Chuan Victor Lee (the "Debtor") filed his individual chapter 11 petition on April 3, 2019. The Debtor worked at and holds a 100% ownership interest in Advanced Body Collision, Inc. Auto Body and Paint ("ABC"). The Debtor's bankruptcy was precipitated by the Debtor's attempt to keep another business he had an interest in afloat. The Debtor took loans to support his other business and used ABC as collateral, as well as providing a personal guaranty. Plan at 6. The Debtor was unable to keep up with the loans and their high interest rates (between 40%-60%) and sought help from "debtor assistance programs." *Id.* at 7. None of his attempts were successful in reorganizing any of his debts and he determined that his only option was bankruptcy.

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Chapter 11

On April 14, 2021, Debtor filed a motion for an order confirming its chapter 11 plan (Doc. No. 166). On May 12, 2021, the Plan was confirmed, and the effective date of June 12, 2021, has passed (Doc. No. 170). As of the filing of this petition, the Plan is final, all deposits required under the Plan have been distributed, all property proposed by the plan to be transferred has been transferred, Debtor has assumed the business, all payments or distribution under the plan have commenced, and all motions, contested matters, and adversary proceedings have been finally resolved. A post confirmation status conference is scheduled for September 8, 2021 at 10:00 a.m.

As of the date of this tentative ruling, no opposition is on file.

II. Findings of Fact and Conclusions of Law

A. Final Decree

Under 11 U.S.C. § 350(a) and Fed. R. Bankr. P. 3022, the Court shall enter a final decree closing a chapter 11 case after the estate is fully administered. In determining whether an estate is fully administered, a court should consider:

- (1) whether the order confirming the plan has become final;
- (2) whether deposits required by the plan have been distributed;
- (3) whether the property proposed by the plan to be transferred has been transferred;
- (4) whether the debtor or the successor of the debtor under the plan has assumed the business of the management of the property dealt with by the plan;
- (5) whether payments under the plan have commenced; and
- (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.

In re Ground Systems, Inc., 213 B.R. 1016, 1019 (9th Cir. BAP 1997), *quoting* Fed. R. Bankr. P. 3022 advisory committee's notes (1991).

The Court finds that entry of a final decree closing this case is warranted as follows: (i) the order confirming the Plan is now final; (ii) deposits required by the Plan have been distributed; (iii) property proposed by the Plan has been transferred, (iv) payments under the Plan have commenced; (v) the Debtor has assumed business

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Ya-Chuan Victor Lee

Chapter 11

management; and (vi) all motions, contested matters, and adversary proceedings have been finally resolved. Motion at 3. In sum, the Court's involvement in the case is no longer required and the Court finds the case has been "fully administered."

The Court finds that entry of a final decree is appropriate.

Upon completion of all payments under the Plan, the Debtor shall file a motion to reopen the case, followed by a motion seeking entry of a discharge.

Based upon the foregoing, the Motion is GRANTED. The Debtor shall submit a proposed order, incorporating this tentative ruling by reference, within seven days of the hearing.

III. Conclusion

For the reasons set forth above, the Motion is GRANTED.

The Debtor is directed to lodge a conforming proposed order, incorporating the tentative ruling by reference, within 7 days of the hearing.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

Ya-Chuan Victor Lee

Represented By
Marcus G Tiggs

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11:00 AM

2:19-13763 Ya-Chuan Victor Lee

Chapter 11

#101.00 HearingRE: [180] Application for Compensation (with proof of service) for Marcus G Tiggs, Debtor's Attorney, Period: 4/4/2019 to 6/4/2021, Fee: \$57,970.00, Expenses: \$3,899.30.

Docket 180

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

Having reviewed the first and final application for fees and expenses filed by this applicant, the court approves the application and awards the fees and expenses set forth below:

Fees: \$20,455.50 (\$61,869.30 less \$37,514.50 pre-petition retainer paid)[Doc. No. 180]

Expenses: \$3,899.30 approved [*Id.*]

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Daniel Koontz or Landon Foody at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Applicant shall submit a conforming order within seven days of the hearing.

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CONT... Ya-Chuan Victor Lee

Chapter 11

Party Information

Debtor(s):

Ya-Chuan Victor Lee

Represented By
Marcus G Tiggs

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2:19-13763 Ya-Chuan Victor Lee

Chapter 11

#102.00 Hearing
RE: [181] Application for Compensation (with proof of service) for Amy Liao,
Accountant, Period: 5/3/2019 to 1/6/2021, Fee: \$10,400.00, Expenses: \$0.00.

Docket 181

***** VACATED *** REASON: Notice of withdrawal filed 9/7/21**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Ya-Chuan Victor Lee

Represented By
Marcus G Tiggs

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Chapter 11

#102.10 Hearing re A post confirmation status conference

fr. 5-5-21; 9-8-21

Docket 0

Tentative Ruling:

9/21/2021

See Cal #100, tentative ruling incorporated in its entirety.

Party Information

Debtor(s):

Ya-Chuan Victor Lee

Represented By
Marcus G Tiggs

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, September 22, 2021

Hearing Room 1568

11:00 AM

2:20-10264 450 S. Western, LLC, a California limited liability

Chapter 11

#103.00 Hearing re [434] Objection to Claim #2 by Claimant David S. Kim & Associates.
in the amount of \$ 225,778.87

FR. 9-1-21

Docket 0

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

On September 15, 2021, the Liquidating Trustee filed papers stating that it was prepared to withdraw the instant objection to the Proof of Claim asserted by Kim & Associates (the "Kim Claim") provided that Kim & Associates (the "Kim Firm") submitted a declaration attesting that it had not previously received payment for any of the amounts sought in the Kim Claim. *See* Doc. No. 526. On September 17, 2021, the Kim Firm filed a declaration attesting that (a) it had not received payment of any of the amounts sought in the Kim Claim and that (b) the amounts asserted in the Kim Claim represented only fees and costs incurred representing the Debtor, not fees and costs incurred representing parties affiliated with the Debtor. *See* Doc. No. 528 (the "Kim Declaration").

Based upon the foregoing, it appears that the instant claim objection has been resolved. Within seven days of the hearing, the Liquidating Trustee shall withdraw its objection to the Kim Claim.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the**

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CONT... 450 S. Western, LLC, a California limited liability Chapter 11

tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Party Information

Debtor(s):

450 S. Western, LLC, a California

Represented By

Aram Ordubegian

Christopher K.S. Wong

M Douglas Flahaut

Amelia Puertas-Samara

Dylan J Yamamoto

**United States Bankruptcy Court
Central District of California
Los Angeles
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2:20-10264 450 S. Western, LLC, a California limited liabilit

Chapter 11

#104.00 Hearing
RE: [381] Motion to Disallow the Claim of Admire Capital Lending LLC and
Belmont Two Investment Holdings, LLC, Filed as Proof of Claim No. 13-2

Docket 381

***** VACATED *** REASON: CONTINUED 10-19-21 AT 10:00 A.M.**

Tentative Ruling:

9/21/2021

Order entered. Hearing **CONTINUED** to **October 19, 2021 at 10:00 a.m.**

Party Information

Debtor(s):

450 S. Western, LLC, a California

Represented By

Aram Ordubegian

Christopher K.S. Wong

M Douglas Flahaut

Amelia Puertas-Samara

Dylan J Yamamoto

**United States Bankruptcy Court
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#105.00 Hearing
RE: [414] Motion to Disallow Claims -- Motion to Partially Disallow the Claim of
Philmont Management, Inc. Filed as Proof of Claim No. 18-1 and Declaration of
Dylan J. Yamamoto in Support Thereof, with Proof of Service

Docket 414

***** VACATED *** REASON: PER ORDER ENTERED 9-3-21**

Tentative Ruling:

9/21/2021

Hearing **VACATED**. The Court has approved a stipulation resolving this matter. *See*
Doc. No. 503.

Party Information

Debtor(s):

450 S. Western, LLC, a California

Represented By

Aram Ordubegian
Christopher K.S. Wong
M Douglas Flahaut
Amelia Puertas-Samara
Dylan J Yamamoto

**United States Bankruptcy Court
Central District of California
Los Angeles
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2:21-12222 collab9, LLC, a Delaware limited liability company

Chapter 11

#106.00 HearingRE: [195] Motion Debtor's Motion for Approval of Debtor's Settlement Agreement with PCM Parties and RAPP Parties; Declaration of George Blanco; Declaration of David S. Kupetz w/Proof of Service (Sahn, Victor)

Docket 195

Tentative Ruling:

9/21/2021

Note: Parties may appear at the hearing either in-person or by telephone. Parties electing to appear in-person shall comply with all requirements regarding social distancing, use of face masks, etc. which may be in effect at the time of the hearing. Parties electing to appear by telephone should contact CourtCall at 888-882-6878 no later than one hour before the hearing.

For the reasons set forth below, the *Debtor's Motion for Approval of Debtor's Settlement Agreement With PCM Parties and Rapp Parties* [Bankr. Doc. No. 195] and the Debtor's *Motion to Dismiss "Amended Complaint for Declaratory Judgment"* [Adv. Doc. No. 17] are both **DENIED**.

Pleadings Filed and Reviewed:

- 1) Rule 9019 Motion:
 - a) Debtor's Motion for Approval of Debtor's Settlement Agreement With PCM Parties and Rapp Parties [Bankr. Doc. No. 195]
 - i) Notice of Hearing on Debtor's Motion for Approval of Debtor's Settlement With PCM Parties and Rapp Parties [Bankr. Doc. No. 196]
 - b) Motion for Order Authorizing Debtor to File Exhibits 3, 12, and 13 to "Debtor's Motion for Approval of Debtor's Settlement with PCM Parties and Rapp Parties" Under Seal [Bankr. Doc. No. 198]
 - c) Order Granting Motion for Order Authorizing Debtor to File Exhibits 3, 12, and 13 to "Debtor's Motion for Approval of Debtor's Settlement Agreement With PCM Parties and Rapp Parties" Under Seal [Bankr. Doc. No. 204]
 - d) Opposition of Dinco, Inc. and Attiaza M. Din to Debtor's Motion for Approval

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CONT... **collab9, LLC, a Delaware limited liability company** **Chapter 11**
of Settlement Agreement With PCM Parties and Rapp Parties [Bankr. Doc. No. 209]
e) Debtor's Reply to Din and Dinco's Opposition to Debtor's Motion for Approval of Debtor's Settlement Agreement With PCM Parties and Rapp Parties [Bankr. Doc. No. 214]
2) Motion to Dismiss:
a) Amended Complaint for Declaratory Judgment [Adv. Doc. No. 6]
b) Notice of Motion and Motion to Dismiss "Amended Complaint for Declaratory Judgment" [Adv. Doc. No. 17]
c) Opposition of Dinco, Inc. and Attiazaz M. Din to Debtor's Motion to Dismiss [Adv. Doc. No. 23]
d) Debtor's Reply to Din and Dinco's Opposition to Motion to Dismiss "Amended Complaint for Declaratory Judgment" [Adv. Doc. No. 24]

I. Facts and Summary of Pleadings

A. Introduction

On March 19, 2021 (the "Petition Date"), collab9, LLC (the "Debtor") filed a voluntary Chapter 11 petition. On May 21, 2021, the Court approved the sale of substantially all of the Debtor's operating assets to SecureComm LLC. *See* Bankr. Doc. No. 157 (the "Sale Order").

The Debtor is owned by Dinco, Inc. ("Dinco"), which holds a 50% interest, and Dollab, LLC ("Dollab"), which also holds a 50% interest. Attiaza M. Din ("Din") is the principal of Dinco, and Firoz Lalji ("Lalji") is the sole member of Dollab.

The Debtor moves for approval of a *Settlement and Mutual Release Agreement* (the "Settlement Agreement"), which provides for the settlement of litigation pending in the Delaware Superior Court, the Los Angeles Superior Court, the Orange County Superior Court, and the Islamabad Civil Court in Pakistan (collectively, the "Litigation") in exchange for a payment to the estate of \$750,000. Dinco and Din (collectively, the "Objectors") oppose approval of the Settlement Agreement. Objectors assert that the Debtor assigned the Litigation to Dinco in September 2016, and that accordingly the Debtor lacks the ability to settle the Litigation.

On July 28, 2021, the Objectors filed an *Amended Complaint for Declaratory Judgment* [Adv. Doc. No. 6] (the "Complaint") against the Debtor. **[Note 1]** The Complaint alleges that the Litigation is owned by the Objectors and seeks a declaration to that effect. In connection with its motion for approval of the Settlement Agreement, the Debtor also moves to dismiss the Complaint for failure to state a

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CONT... collab9, LLC, a Delaware limited liability company

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claim upon which relief can be granted. The Objectors oppose dismissal of the Complaint.

B. The Assignment Agreement and Indemnification Agreement

On March 12, 2015, the Debtor's predecessor, En Pointe Technologies Sales, Inc. ("En Pointe Seller") entered into an Asset Purchase Agreement (the "APA") with PCM, Inc. ("PCM"), a competitor, and other parties. En Pointe Seller was a reseller of hardware, software, and IT services. The APA provided for the sale of En Pointe Seller's main resale business to PCM. The purchase price consisted of cash as well as a series of additional payments to be made over a period of three years (the "Earn Out Payments"). The Earn Out Payments depended upon the performance of the assets sold and were calculated in accordance with a formula set forth in the APA.

On September 30, 2016, the Debtor and Dinco entered into an *Assignment and Assumption Agreement* [Bankr. Doc. No. 195, Ex. 10] (the "Assignment Agreement"), pursuant to which the Debtor assigned certain assets to Dinco:

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the [Debtor] hereby grants, sells, transfers, assigns, conveys and delivers to [Dinco], and [Dinco] hereby purchases, accepts and acquires from the [Debtor], good and marketable title, free and clear from any and all liens, to all of the Assets consisting of the property listed on Exhibit A hereto (the "*Assets*").

Assignment Agreement at ¶ 1.

Among the assets assigned by the Assignment Agreement were the Earn Out Payments that the Debtor was entitled to receive under the APA. (The Assignment Agreement refers to the Earn Out Payments as an "Earn Out Receivable" and values the Earn Out Payments at \$1,320,041.00 as of September 30, 2016. *See* Assignment Agreement at Ex. A and Assignment Agreement at Ex. A, Schedule 2.)

The Assignment Agreement contains a "power of attorney" provision authorizing Dinco to initiate and prosecute litigation where necessary to vindicate Dinco's ability to realize the value of the assigned assets:

The [Debtor] hereby constitutes and appoints [Dinco], its successors and assigns, the true and lawful attorneys of the [Debtor] with full power of substitution, in the name of the [Debtor], or in the name and stead of the

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[Debtor], but on behalf of and for the benefit of the [Debtor], its respective successors and assigns (and at the expense of [Dinco]): ...

- b) to institute and prosecute in the [Debtor's] name, or otherwise, for the benefit of [Dinco], any and all actions, suits or proceedings, at law, in equity or otherwise, which [Dinco] may deem proper in order to collect, assert or enforce any claim, right or title of any kind in or to the Assets hereby sold and assigned to [Dinco] or intended so to be, to defend or compromise any and all such actions, suits or proceedings in respect of any of the Assets, and to do all such acts and things in relation thereto as the [Dinco] shall deem advisable for the collection or reduction to possession of any of the Assets; and
- c) to take any and all other reasonable action designed to more fully vest in [Dinco] the Assets hereby sold to [Dinco] or intended to be so sold, and in order to provide for the Assignee the benefit, use, enjoyment and possession of the Assets.

The [Debtor] acknowledges that the foregoing powers are coupled with an interest and shall be irrevocable by the [Debtor] or upon the [Debtor's] subsequent dissolution or in any manner or for any reason whatsoever.... The [Debtor] shall from time to time pay to [Dinco], when received, any amounts that shall be received directly or indirectly by the [Debtor] (including amounts received as interest) in respect of any of the Assets sold, assigned or transferred to the [Dinco] pursuant hereto.

Assignment Agreement at ¶ 6.

The Assignment Agreement is governed by California law. *See* Assignment Agreement at ¶ 13.

On May 20, 2019, the Debtor, on the one hand, and Din and Dinco, on the other hand, entered into a *Litigation Indemnification Agreement* [Bankr. Doc. No. 195, Ex. 11] (the "Indemnification Agreement"). The Indemnification Agreement is governed by New York law. *See* Indemnification Agreement at ¶ 9. In the Indemnification Agreement, Dinco and Din agreed to indemnify the Debtor for any obligations arising in connection with the Litigation:

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[Din and Dinco] shall jointly and severally indemnify, hold harmless, and defend the [Debtor] for, from, and against all actions, suits, judgments, claims, proceedings, orders, losses, liabilities, damages (including any punitive damages), penalties, fines, costs, and expenses, court costs and fees, and out-of-pocket expenses of attorneys and expert witnesses of any kind or nature whatsoever (but excluding any consequential or indirect damages, including loss profits or diminution of value), which may, at any time or from time to time, be imposed upon, incurred by, or asserted or awarded against, the Indemnitees by reason of, or arising from or out of, any Covered Actions [the Litigation] or the enforcement of this Agreement (collectively, "**Indemnified Obligations**").

Indemnification Agreement at ¶ 1.

The Indemnification Agreement contains the following integration clause:

This Agreement embodies the final, entire agreement of the [Din and Dinco] and the [Debtor] with respect to the Indemnified Obligations and supersedes any and all prior commitments, agreements, representations, and understandings, whether written or oral, relating to the subject matter hereof. This Agreement is intended by the [Din and Dinco] and the [Debtor] as a final and complete expression of the terms of this Agreement, and no course of dealing between the [Din and Dinco] and the [Debtor], no course of performance, no trade practices, and no evidence of prior, contemporaneous, or subsequent oral agreements or discussions or other extrinsic evidence of any nature shall be used to contradict, vary, supplement, or modify any term of this Agreement. There are no oral agreements between the [Din and Dinco] and the [Debtor] relating to the Indemnified Obligations or any other obligation of the [Din and Dinco] under this Agreement, and any such oral agreements are hereby superseded by this Agreement.

Indemnification Agreement at ¶ 5.

C. The Litigation

Subsequent to execution of the APA, disputes arose regarding the Earn Out Payments. To enforce its rights with respect to the Earn Out Payments that had been assigned under the Assignment Agreement, Dinco caused litigation to be commenced

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in the name of the Debtor against various parties. In an action commenced in the Delaware Superior Court on December 5, 2016 (the "Delaware Action"), the Debtor alleged that it had not received the full amount of the Earn Out Payments to which it was entitled because the purchaser, En Pointe Buyer, (a) had maintained financial records in a manner that made it impracticable to accurately calculate the Earn Out Payments; (b) had created a sham entity to move revenue off the purchaser's books in order to reduce its Earn Out Payment obligations; (c) and had operated the purchased business in a manner that was designed to minimize the purchaser's Earn Out Payment obligation.

Other disputes subsequent to the closing of the sale arose between the parties to the APA. Pursuant to its rights under the Assignment Agreement, Dinco caused litigation to be commenced in the Debtor's name with respect to these disputes. In an action commenced in the Los Angeles Superior Court (the "LASC") on January 13, 2017 (the "SAP System Action"), the Debtor alleged that PCM and its affiliates had improperly accessed and used the Debtor's software configuration subsequent to the closing of the sale. On July 14, 2017, the LASC granted the Defendants' motion to dismiss the SAP System Action on the ground that it had not been brought in the proper forum.

In an action commenced in the Islamabad Civil Court in Pakistan in May 2017 (the "Pakistan Action"), the Debtor asserted claims against Ovex Technologies (Private) Ltd. ("Ovex") relating to Ovex's alleged disclosure of the Debtor's confidential information.

In an action commenced in the Orange County Superior Court in March 2018 (the "California Rapp Action"), the Debtor alleged that Michael Rapp (the president of the entity that had purchased the Debtor's assets in 2015) and other parties had breached their fiduciary duties by failing to maximize the Earn Out Payments.

In an action commenced in the Delaware Superior Court in February 2019 (the "Delaware Rapp Action"), the Debtor also alleged that Michael Rapp and other parties had breached their obligation to maximize the Earn Out Payments. (The Delaware Action, the Pakistan Action, the California Rapp Action, and the Delaware Rapp Action are collectively referred to as the "Litigation." The definition of "Litigation" excludes the SAP System Action—which has already been dismissed—because the Settlement Agreement is not conditioned upon the dismissal of the SAP System Action.)

D. The Proposed Settlement Agreement

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The material terms of the Settlement Agreement are as follows:

- 1) After the Bankruptcy Court has ruled that the Debtor has the authority to dismiss with prejudice all claims brought in the Litigation, and such ruling has not been stayed pending appeal, the parties will file papers dismissing the Litigation with prejudice. Settlement Agreement at ¶ 4.
- 2) Within thirty days after the entry of unstayed orders dismissing the Litigation, PCM shall pay the Debtor \$750,000 (the "Settlement Amount"); provided, however, that an unstayed order dismissing the Pakistan Action is not a condition precedent to payment of the Settlement Amount. *Id.*

E. Summary of Papers Filed in Connection with the Motions

The primary issue in dispute is whether the Litigation is owned by the Debtor or by the Objectors. The Debtor asserts that it owns the Litigation, and therefore has the ability to move for approval of the Settlement Agreement, for the following reasons:

- 1) The Indemnification Agreement contains an integration clause stating that it "supersedes any and all prior commitments, agreements, representations, and understandings, whether written or oral, relating to the subject matter hereof." Indemnification Agreement at ¶ 5. The Indemnification Agreement and the Assignment Agreement both pertain to the Litigation. Therefore, the Indemnification Agreement supersedes the Assignment Agreement, making it inappropriate for the Court to consult the Assignment Agreement to ascertain the Objector's rights in the Litigation. The Indemnification Agreement does not state that the Litigation has been assigned to the Objectors. It states only that the Objectors are entitled to all proceeds realized in connection with the Litigation. In other words, in exchange for the Objectors indemnifying the Debtor and paying expenses, they are obtaining a right to payment from the proceeds of the Litigation. This "right to payment" is a "claim" within the meaning of § 101(5); as a result, the rights of the Objectors under the Indemnification Agreement are limited to the ability to file a proof of claim.
- 2) The Indemnification Agreement is an executory contract that has not been assumed and can be rejected by the Debtor. As long as the Debtor does not assume the Indemnification Agreement, the rights of the Objectors thereunder are only those of the holder of a general unsecured prepetition claim against the Debtor. Once again, this means that the Objectors are entitled to file a

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proof of claim but are not entitled to block approval of the Settlement Agreement.

- 3) Even if the Indemnification Agreement does not supersede the Assignment Agreement, the Assignment Agreement did not transfer the Litigation to Dinco. The Assignment Agreement does not reference the Litigation, which had not even been commenced at the time the Assignment Agreement was executed. In addition, the draft Confidential Global Settlement Agreement included a representation and warranty that none of the claims that were the subject of that agreement had been previously assigned by any of the parties.
- 4) If the Court accepted the Objectors' position that they own the Litigation, that would mean that the Litigation has been prosecuted in a manner that is prohibited under the laws of California and Delaware. Both California and Delaware require that every action be prosecuted in the name of the real party in interest. Here, the Litigation has been prosecuted in the name of the Debtor, not in the name of the Objectors. As a result, the courts presiding over the Litigation have been misled. The Objectors should therefore be judicially estopped from asserting that they own the Litigation.

The Objectors dispute the Debtor's contention that they do not own the Litigation. According to the Objectors, the Assignment Agreement was not superseded by the Indemnification Agreement because the Assignment Agreement and the Indemnification Agreement deal with different subject matter, making the Indemnification Agreement's integration clause inapplicable. The Objectors maintain that the Debtor's argument that the Indemnification Agreement is an executory contract is irrelevant, because the rejection of an executory contract does not result in that contract's termination. Therefore, the Objectors state, the Debtor's rejection of either the Assignment Agreement or the Indemnification Agreement would not terminate the ownership rights conveyed to Dinco under those agreements.

II. Findings of Fact and Conclusions of Law

A. The Debtor's Motion for Approval of the Settlement Agreement is Denied

The Court cannot approve the Settlement Agreement unless the Litigation is property of the Debtor's estate. This result is compelled both by the language of the Settlement Agreement itself and by applicable bankruptcy law. Under the Settlement Agreement, PCM is not obligated to make the Settlement Payment unless orders dismissing the Litigation have been entered. Settlement Agreement at ¶ 5. [Note 2]

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The parties to the Settlement Agreement are not required to file papers effectuating the dismissal of the Litigation unless "the Bankruptcy Court has ruled that [the Debtor] has the authority to dismiss with prejudice all of its counts, Claims, and causes of action in [the Litigation]." *Id.* at ¶ 4.

Under applicable bankruptcy law, a finding that the Litigation is property of the Debtor's estate is also a prerequisite to approval of the Settlement Agreement. "[T]he disposition by way of 'compromise' of a claim that is an asset of the estate is the equivalent of a sale of the intangible property represented by the claim, which transaction simultaneously implicates the 'sale' provisions under section 363 as implemented by Rule 6004 and the 'compromise' procedure of Rule 9019(a)." *Goodwin v. Mickey Thompson Ent. Grp., Inc. (In re Mickey Thompson Ent. Grp., Inc.)*, 292 B.R. 415, 421 (B.A.P. 9th Cir. 2003). Property may not be sold under § 363 unless it is property of the estate. *See Moldo v. Clark (In re Clark)*, 266 B.R. 163, 172 (B.A.P. 9th Cir. 2001) ("In other words, if the property is exempt it may not be sold by the Trustee; if it is not exempt, it may be sold. The threshold question, is it still property of the estate, must first be decided."); *see also Hey v. Silver Beach, LLC (In re Silver Beach, LLC)*, No. NV-09-1049, 2009 WL 7809002, at *5 (B.A.P. 9th Cir. Nov. 3, 2009) (unpublished disposition) ("Implicit within the statutory grant of authority to sell property under section 363(b), is the requirement that the estate actually have an interest in the property to be sold. For that reason, a bankruptcy court may not allow the sale of property as 'property of the estate' without first determining whether the debtor in fact owns the property.").

The Court finds that the Settlement Agreement cannot be approved because the Litigation which is the subject thereof is not property of the Debtor's estate. The Litigation was assigned to the Objectors by way of the Assignment Agreement. All of the Debtor's arguments as to why the Litigation remains property of the estate notwithstanding the Assignment Agreement are without merit.

First, the Debtor argues that the Assignment Agreement has been superseded by the Indemnification Agreement, and that there is nothing in the Indemnification Agreement assigning the Litigation to the Objectors. In support of this argument, the Debtor places substantial weight upon the Indemnification Agreement's integration clause, which states that "[t]his Agreement embodies the final, entire agreement of the [Din and Dinco] and the [Debtor] with respect to the Indemnified Obligations and supersedes any and all prior commitments, agreements, representations, and understandings, whether written or oral, relating to the subject matter hereof."

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Indemnification Agreement at ¶ 5.

The Debtor's argument does not sufficiently account for the fact that the integration clause contains the qualifying phrase "relating to the subject matter hereof." The subject matter of the Indemnification Agreement is the obligation of the Objectors to indemnify the Debtor in connection with the Litigation. By contrast, the subject matter of the Assignment Agreement is the assignment of certain of the Debtor's assets—including the Earn Out Payments and the right to commence litigation to collect upon the Earn Out Payments—to Dinco. Because the Assignment Agreement and the Indemnification Agreement do not pertain to the same subject matter, the Indemnification Agreement does not supersede the Assignment Agreement.

The Indemnification Agreement is governed by New York law, *see* Indemnification Agreement at ¶ 9, and the application of New York law to the integration clause further demonstrates that the Indemnification Agreement does not supersede the Assignment Agreement. Under New York law, "a subsequent contract not pertaining to precisely the same subject matter will not supersede an earlier contract unless the subsequent contract has definitive language indicating it revokes, cancels or supersedes that specific prior contract." *Long Side Ventures, LLC v. Adarna Energy Corp.*, 2014 WL 4746026, at *6 (S.D.N.Y. Sept. 24, 2014) (unpublished disposition). Two contracts do not deal with "precisely the same subject matter" even if both contracts "have broadly associated subject matter in common." *CreditSights, Inc. v. Ciasullo*, No. 05-CV-9345-DAB, 2007 WL 943352, at *6 (S.D.N.Y. Mar. 29, 2007) (unpublished disposition). As discussed above, the Indemnification Agreement and the Assignment Agreement do not cover "precisely the same subject matter." The Indemnification Agreement sets forth the Objectors' obligation to indemnify the Debtor with respect to the Litigation, whereas the Assignment Agreement transfers certain assets of the Debtor to Dinco.

Second, the Debtor asserts that even if the Indemnification Agreement does not supersede the Assignment Agreement, the Assignment Agreement itself did not transfer the Litigation to the Objectors. In support of its contention that the Litigation was not transferred by the Assignment Agreement, the Debtor notes that (a) the Assignment Agreement does not mention the Litigation, (b) the Litigation had not been commenced at the time the Assignment Agreement was executed, and (c) the draft Confidential Global Settlement Agreement represented that the Litigation had not been previously assigned.

The Debtor's contention that the Assignment Agreement did not transfer the

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Litigation to the Objectors is without merit. The Assignment Agreement conferred upon Dinco the right "to institute and prosecute in the [Debtor's] name, or otherwise, for the benefit of [Dinco], any and all actions, suits or proceedings, at law, in equity or otherwise, which [Dinco] may deem proper in order to collect, assert or enforce any claim, right or title of any kind in or to the Assets hereby sold and assigned to [Dinco]." Assignment Agreement at ¶ 6(b). The Earn Out Payments were among the assets transferred to Dinco by the Assignment Agreement. Therefore, the Assignment Agreement transferred to Dinco the right to initiate and prosecute litigation to vindicate Dinco's rights in the Earn Out Payments. It is immaterial that the Assignment Agreement does not mention the Litigation by name or that the Litigation had not been commenced at the time the Assignment Agreement was executed. And representations in the draft Confidential Global Settlement Agreement that the Litigation had not been previously assigned cannot override the plain language of the Assignment Agreement.

Because the Assignment Agreement clearly provides that the right to pursue the Litigation was transferred to Dinco, the Debtor's assertion that the Objectors do not own the Litigation but instead possess only a right to be paid from the proceeds of the Litigation fails. The corollary to this assertion—that the purportedly limited rights of the Objectors in the Litigation are nothing more than a claim against the estate—fails as well.

Third, the Debtor argues that the Objectors should be estopped from asserting that they own the Litigation. According to the Debtor, the Objectors have misled the courts presiding over the Litigation by prosecuting the Litigation in the name of the Debtor, as opposed to prosecuting the Litigation under the name of Dinco, which is the real party in interest.

The Court declines to find that the Objectors misled the courts presiding over the Litigation, as making such a finding would impinge upon the jurisdiction of those courts. Only the Delaware Superior Court and the Orange County Superior Court can determine whether the pending claims should have been brought by Dinco rather than by the Debtor. It is not appropriate for this Court to make findings that would have far-reaching impacts upon actions pending before other courts.

Fourth, the Debtor argues that the Indemnification Agreement is an executory contract that the Debtor has the ability to reject. Under the Debtor's theory, unless the Debtor assumes the Indemnification Agreement, the Objectors can assert only a general unsecured prepetition claim on account of the rights granted to them under the Indemnification Agreement, and lack the ability to block approval of the Settlement

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Agreement.

The Debtor's argument fails to account for the Supreme Court's holding in *Mission Product Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1662 (2019). As stated in *Tempnology*:

A rejection does not terminate the contract. When it occurs, the debtor and counterparty do not go back to their pre-contract positions. Instead, the counterparty retains the rights it has received under the agreement. As after a breach, so too after a rejection, those rights survive.

Mission Prod. Holdings, Inc. v. Tempnology, LLC, 139 S. Ct. 1652, 1662, 203 L. Ed. 2d 876 (2019).

Therefore, even if the Indemnification Agreement or the Assignment Agreement could be properly classified as executory contracts (a finding the Court does not make), the Debtor's rejection of either agreement would not divest Dinco of the ownership in the Litigation conferred upon it by the Assignment Agreement. Instead, rejection would allow Dinco to retain its ownership rights in the Litigation, giving it the ability to block approval of the Settlement Agreement, and would additionally provide Dinco an unsecured claim on account of whatever damages it sustained as a result of the rejection.

B. The Debtor's Motion to Dismiss the Complaint is Denied

The Debtor moves to dismiss the Complaint for failure to state a claim upon which relief can be granted, pursuant to Civil Rule 12(b)(6). Relying upon the same arguments advanced in support of the motion to approve the Settlement Agreement, the Debtor maintains that dismissal of the Complaint is warranted based upon the plain language of the Indemnification Agreement. That is, the Debtor asserts that because the Indemnification Agreement supersedes the Assignment Agreement, the Objectors lack an ownership interest in the Litigation, meaning that the Objectors' request for a declaratory relief regarding their ownership rights in the Litigation must be dismissed.

As explained above, the Debtor's contention that the Objectors do not own the Litigation is without merit. Consequently, the Debtor's motion to dismiss the Complaint also fails.

The Debtor's position is that the Complaint can be resolved based solely on the information already presented to the Court. *See Debtor's Motion to Dismiss "Amended*

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, September 22, 2021

Hearing Room 1568

11:00 AM

CONT... collab9, LLC, a Delaware limited liability company

Chapter 11

Complaint for Declaratory Judgment" [Adv. Doc. No. 17] at 11 ("Accordingly, this matter can be resolved strictly based on the documents attached as exhibits to the Complaint"). The Court agrees that with the Debtor that the Complaint can be adjudicated based solely upon a review of the Indemnification Agreement and Assignment Agreement. For the reasons set forth in Section II.A., above, the Assignment Agreement establishes that the Objectors own the Litigation. The Objectors are therefore entitled to entry of a declaratory judgment to that effect.

III. Conclusion

Based upon the foregoing, the *Debtor's Motion for Approval of Debtor's Settlement Agreement With PCM Parties and Rapp Parties* [Bankr. Doc. No. 195] and the Debtor's *Motion to Dismiss "Amended Complaint for Declaratory Judgment"* [Adv. Doc. No. 17] are both **DENIED**. In addition, the Court will enter a declaratory judgment determining that the Objectors own the Litigation.

Within seven days of the hearing, the Objectors shall submit (a) a proposed order denying the Debtor's motion for approval of the Settlement Agreement, (b) a proposed order denying the Debtor's motion to dismiss the Complaint, and (c) a proposed judgment determining that the Objectors own the Litigation. The Status Conference on the Complaint, set for October 12, 2021 at 10:00 a.m., is **VACATED AS MOOT**.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz, the Judge's Law Clerks, at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

The initial *Complaint for Declaratory Judgment* [Adv. Doc. No. 1] was filed on July 27, 2021, one day prior to the filing of the *Amended Complaint for Declaratory Judgment* [Adv. Doc. No. 6]. The Amended Complaint was filed to correct an error in the caption of the initial Complaint and is not materially different from the initial Complaint.

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Note 2

Entry of an order dismissing the Pakistan Action is not a pre-requisite to PCM's obligation to make the Settlement Payment.

Party Information

Debtor(s):

collab9, LLC, a Delaware limited

Represented By
Victor A Sahn
David S Kupetz
Claire K Wu

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
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Wednesday, September 22, 2021

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Adv#: 2:21-01161 Din et al v. collab9, LLC, a Delaware limited liability company

#107.00 HearingRE: [17] Motion to Dismiss Adversary Proceeding Notice of Motion and Motion to Dismiss "Amended Complaint for Declaratory Judgment"; Memorandum of Points and Authorities; Declaration of David S. Kupetz w/Proof of Service

Docket 17

Tentative Ruling:

9/21/2021

See Cal. No. 106, above, incorporated in full by reference.

Party Information

Debtor(s):

collab9, LLC, a Delaware limited

Represented By
Victor A Sahn
David S Kupetz
Claire K Wu

Defendant(s):

collab9, LLC, a Delaware limited

Represented By
David S Kupetz

Plaintiff(s):

DINCO, INC., a Delaware

Represented By
Roye Zur

Attiazaz M. Din

Represented By
Roye Zur